UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: January 16, 2002
Defendants.	)	

UNITED STATES' MOTION *IN LIMINE* AND
BRIEF IN SUPPORT TO EXCLUDE EVIDENCE OR ARGUMENT
THAT THE DEFENDANTS RELIED ON "ADVICE OF COUNSEL"

I
INTRODUCTION

At the pretrial conference held on January 9, 2002, the United States raised the issue of excluding any argument or evidence based on the defense of "advice of counsel." The Court asked the parties to brief the issue. In the within Motion, the United States moves this Court for an *in limine* order precluding the defendants, Bennett T. Martin and Martin News Agency, Inc., from presenting any argument or evidence in this trial that they are not guilty of the charged conduct alleged in the Indictment because they acted on the basis of advice from their counsel. During the pretrial conference and in their pretrial materials, the defendants have made it clear that they intend to introduce irrelevant argument and evidence into this trial serving no purpose other than to mislead and confuse the jury and unduly prolong this trial. (See Defendant's Jury Instruction No. 29). "Advice of counsel" is not a defense to a *per se* Sherman Act violation. Accordingly, for the reasons stated below, no such argument or evidence is proper and it should be excluded.

In addition, before this trial turns into a lengthy side show resulting in a lengthy trial-within-a-trial, the United States requests that this Court order the defendants pretrial to make a proffer as to the subject matter about which each of their lawyer-witnesses will testify, including all 10 lawyers currently identified as defense witnesses on their Witness list. None of these

lawyers should be allowed to testify in support of an advice of counsel defense. Nor should any argument be permitted without an offer of proof. Whenever a lawyer testifies at trial, there is a built-in danger that his testimony will be given too much credit or weight by the jury, especially if it is presented or perceived as being expert-like. Accordingly, before any lawyer testifies in this trial, the United States requests that the defendants be required to make a showing that the evidence satisfies Fed. R. Evid. 402 and 403, *i.e.*, that such evidence is relevant and that it is not more prejudicial than probative, causing confusion of issues and waste of time.

II
FACTS

A. ALAN HOSTETTER: THE LAWYER-WITNESS

On January 8, 2002, the defendants submitted their Witness list. Included on their list are 10 lawyers, including Alan Hostetter. During the charged conspiracy period, Hostetter was the lawyer for Ben Martin and his company, Martin News. Now, Hostetter is a member of the law firm of Burleson, Pate & Gibson, L.L.P. (Burleson Pate). Hostetter is the law partner of Michael P. Gibson, the lawyer for Ben Martin in this trial. Hostetter also is the associate of Richard A. Anderson, an of-counsel member of Burleson Pate, who is Martin News's lawyer in this trial. As their law partner, Hostetter has a stake in the outcome of this trial. In addition to personal and professional ties to Burleson Pate, Gibson and Anderson, in a proffer made to the government, Hostetter admitted that he shares in the profits of Burleson Pate. He thus has an economic interest in the outcome of this trial.

B. THE DEFENDANTS CONTINUE TO WITHHOLD KEY HOSTETTER DOCUMENTS UNDER CLAIM OF PRIVILEGE

The defendants' Exhibit list, also submitted on January 8, 2002, shows that they intend to use work-product privilege as both a sword and shield, especially as it relates to Hostetter's documents. Presumably, the defendants intend to call Hostetter as a witness to elicit legal advice that he gave to them during the charged conspiracy. The defendants, however, refuse to turn over relevant documents in the possession, custody and control of Hostetter, even ones that they have identified as intending to use as evidence in chief at this trial. (Their Exhibit list originally identified four such documents, but the defendants refuse to disclose them to the government and

have now withdrawn them.) Based on many frustrating discussions with defense counsel pretrial trying to get them to comply with Rule 16, it is the government's understanding that many documents belonging to Hostetter have not been disclosed based on a claim of privilege. The government addresses this issue fully in a separate motion titled *United States' Motion and Brief in Support of Discovery*.

C. LAWYERS, LAWYERS EVERYWHERE

That the defendants simply want to confuse issues, mislead the jury, and have this trial devolve into a side show about Ben Martin's *mens rea* is demonstrated by even a cursory review of their Witness list. In addition to Hostetter, the defendants identify another nine lawyers as defense witnesses. These lawyers fall into three categories: (1) lawyers who represented Brian Weiner and his company, PMG/Trinity News (Reese Harrison, Stanley Blend, Cheryl Freed, Bruce Mitchell, Terry Oxford and Ken Gardner); (2) lawyers who represented Louis Page in his separate litigation against Martin News, filed in August 1990 and settled in August 1992 (Barry McNeil and Walter Cook); and (3) one of the lawyers who represented Martin News during the charged conspiracy period (Hostetter).[1] Of these, only Hostetter can testify about advice of counsel, because he was the only lawyer identified on the defendants' witness list who represented the defendants during the charged conspiracy period.[2]

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[1] A review of the handful of Rule 17(c) subpoenas sent to these lawyers shows that the defendants have focused their attention on two separate lawsuits. One, the lawsuit filed by Louis Page, the former owner of Trinity News, against Martin News in August 1990 (Trinity News v. Martin News Agency, Inc.). This lawsuit was settled in August 1992, with Martin News paying $300,000 to Page. At no time was Brian Weiner or his company a party to this lawsuit. Two, the lawsuit filed by Brian Weiner against Martin News in August 1992 (PMG v. Martin News Agency, Inc.). Martin News counter-sued. This lawsuit involved the use of slotting allowances by Trinity News and Martin News to retailers in the Dallas-Fort Worth market. This lawsuit focused on the unilateral conduct of each party, not whether there was an illegal horizontal agreement between Ben Martin and his competitors to divide up territories and customers. This lawsuit was settled in March 1993. The settlement agreement is identified as Government's Exhibit 26. Along with agreeing to a monetary settlement, the parties agreed to eliminate the use of slotting allowances except in two limited circumstances. Whether this settlement agreement was legal or illegal, however, misses the point. It helped to further Ben Martin's and Weiner's illegal collusive agreement, regardless of whether the transaction may have been legitimate but for the underlying collusive agreement.

[2] Curiously, Jack Price, a lawyer intimately involved in some of the collateral private litigation about which Hostetter presumably will testify is not on their Witness list. Perhaps, unlike Hostetter, he is not cooperating with the defendants.

At the pretrial hearing, defense counsel represented that they are in the process of obtaining waivers of work product privilege from various defense counsel. In this hearing, Mr. Anderson acknowledged that, if waivers were not obtained by Monday (January 14, 2002), then the defendants will not be able to call these lawyer-witnesses at trial. Mr. Anderson now seeks to sidestep this issue altogether by withdrawing certain exhibits from the defendants' witness list. See Attachment I, Letter from Richard Anderson to Richard Hamilton and Michael Wood, dated January 14, 2002. But, as discussed below, this two-step shuffle does not permit the defendants to withhold documents relevant to the subject matter of the lawyer-witnesses' testimony.

III
LAW AND ARGUMENT

A. "ADVICE OF COUNSEL" IS NOT AVAILABLE AS A DEFENSE TO A SHERMAN ACT VIOLATION

The Indictment charges that, from August 1990 through October 30, 1995, the defendants divided up territories and customers in Dallas, Fort Worth and the surrounding areas of Texas, a violation of the Sherman Act. The defendants confuse the Sherman Act with statutes that require the government to prove that a defendant "willfully" committed an act, such as in tax prosecutions, which require the government to prove a "voluntary intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12 (1976). "Willfulness" is important to those statutory schemes because they are highly technical, thus creating some danger of making criminals out of individuals who simply are unaware of a legal duty. None of this applies to the Sherman Act. The word "willful" does not appear in the statute. Nor is the Sherman Act a new or complex statute. The Sherman Act is more than 110 years old, and agreements to allocate territories and customers have long been held to be *per se* illegal.

Moreover, while there is an intent element to proving a Sherman Act violation, it is more of general intent requirement. Here, as in all *per se* violations of the Sherman Act, the agreement is the crime, and the government need prove only that the defendants knowingly joined the conspiracy to divide up territories and customers. The need for proof of a higher level of intent in Sherman Act prosecutions was expressly rejected by the Supreme Court in United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978), stating "[a] requirement of proof

not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem . . . both unnecessarily cumulative and unduly burdensome." Id. Thus, here, the government is not required to prove that Ben Martin knew his conduct was illegal, or that he intended to violate the law or restrain trade. This point was driven home by the Fifth Circuit in United States v. All Star Dairies, et al., 962 F.2d 465, 468-69 (5th Cir. 1992):

> Therefore, the government's only burden was to prove that the *per se* agreement alleged was in fact made and that the defendants knowingly and intentionally joined that agreement . . . . The intent element of a *per se* offense is established by evidence that the defendant agreed to engage in conduct that is *per se* illegal; the government is not required to prove that the defendant knew his actions were illegal or that he specifically intended to restrain trade or violate the law.

(citations omitted). See also United States v. Young Bros., Inc., 728 F. 2d 682, 687 (5th Cir. 1984) (the only intent the government need prove for a *per se* violation of the Sherman Act is the defendant's intent to knowingly join or participate in the conspiracy); United States v. Brinkley, 783 F.2d 1157, 1161-62 (4th Cir. 1986) (upholding jury instruction that included charge that "[i]t is also unnecessary for the government to prove that the defendants knew that the . . . conspiracy to allocate the construction project or to rig bids was a violation of the law.").

In United States v. Plitt Southern Theaters, Inc., 671 F. Supp. 1095 (W.D. N.C. 1987), a case squarely on point with ours, the defendant argued pretrial that, as a matter of law, he did not have the criminal intent necessary to violate Section 1 of the Sherman Act because he relied on advice of counsel. Plitt, like our case, involved a market allocation agreement, a *per se* offense. The Plitt Court granted the government's motion *in limine* to preclude the defendants from arguing or presenting evidence that they relied on advice of counsel. Id. at 1096-97. (See United States v. Plitt Southern Theatres, Inc., 1987 WL 19346 *8-10 (W.D.N.C.) (Memorandum and Recommendation of Magistrate Delaney) (Attachment II). Like in the instant case, the government in Plitt argued that "reliance on advice of counsel is not a proper defense to a Sherman Act violation since it is not a specific intent crime." Plitt, Memorandum and Recommendation of Magistrate at *8. The court concluded that advice of counsel is not a proper defense in Sherman Act cases, rather, this defense is available only in a limited class of cases in

which "willful" action is an essential element. Id. (citing United States v. Powell, 513 F.2d 1249, 1251 (8th Cir. 1975), citing 1 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions §16.15 (2d. Ed. 1970)). In granting the government's pretrial motion, the Plitt Court held:

> [T]hat evidence that the Defendants did not know that engaging in split agreements [*i.e.*, a type of market allocation agreement] was unlawful is irrelevant to the criminal intent that is an element of the offense alleged to have been committed by Defendants.

Id. at 1047.

As in Plitt, here it is not relevant if Ben Martin or other Martin News officials knew that they were violating the Sherman Act, or that they intended to violate it. Nor is it relevant whether they sought, or obtained, any advice from their counsel about private litigation that they were involved in with Louis Page, Brian Weiner or their companies. It also is not relevant if they knew that agreeing to divide up territories and customers was illegal. Nor is it relevant whether their lawyers, or any other lawyers, advised them that dividing up territories and customers was illegal. Therefore, any testimony from Alan Hostetter or another lawyer that they gave Ben Martin (or another Martin News official) advice and that Ben Martin (or another Martin News official) relied on it (or not) is irrelevant. Of course, on cross examination, the government will hammer the point home that Ben Martin's lawyers were unaware of his underlying collusive agreement and its implementation because Ben Martin failed to disclose that very important fact, eviscerating any claimed "advice of counsel" defense. But defense counsel will have already won, in that the trial will have turned into a side show.

A defendant must yield to established rules of evidence to assure fairness and reliability in the ascertainment of guilt and innocence. What is relevant is if Ben Martin and other Martin News officials entered into an agreement to divide up the sale of magazines and books in Dallas, Fort Worth and the surrounding areas of Texas. A defendant has no right to present improper and irrelevant evidence and trial courts may exclude evidence which is insufficient as a matter of law to establish a defense. United States v. Komisaruk, 885 F.2d 490, 493 (9th Cir. 1989). Accordingly, there should be no argument or evidence allowed at this trial using "advice of counsel" as a defense to explain Ben Martin's or Martin News's actions.

B. THE DEFENDANTS HAVE MADE NO SHOWING THAT AN "ADVICE OF COUNSEL" DEFENSE IS EVEN APPROPRIATE -- NOR CAN THEY

At a minimum, before this trial turns into a lengthy trial-within-a trial about Ben Martin's *mens rea* and his state of knowledge in entering and furthering his collusive deals with his co-conspirators, all of which is irrelevant in this Sherman Act case, the United States requests that this Court order the defendants pre-trial to proffer evidence sufficient to support a finding that they meet the threshold for even introducing any such argument or evidence. The Court may even want to conduct an evidentiary hearing pretrial to determine the basis for the claimed "advice of counsel" defense. Such a pretrial hearing may, in the end, actually save time, while avoiding prejudice to the government.

It is hornbook law that an "advice of counsel" defense is not appropriate absent a finding that the defendants fully disclosed all known facts to their lawyers and strictly followed their lawyers' advice. The defendants acknowledge this much in their Jury Instruction No. 29. Here, the government is confident that the defendants cannot meet this threshold. No competent lawyer would ever advise his client that it is okay to divide up territories and customers with his competitors. Nor would any competent lawyer ever allow his client to continue such an agreement if his client disclosed the underlying agreement to him. Without a showing that this defense is appropriate, it should be cut off before it confuses and misleads the jury and unduly prolongs this trial, all of which will work to substantially prejudice the government.

C. ANY ARGUMENT OR EVIDENCE SUGGESTING THAT BEN MARTIN OR OTHER MARTIN NEWS OFFICIALS RELIED ON ADVICE OF COUNSEL SHOULD BE EXCLUDED UNDER FED. R. EVID. 403

The infusion into this trial of improper argument and evidence about Ben Martin's supposed reliance on "advice of counsel" is intended to confuse and distract the jury. Its purpose is to mislead the jury into believing that it can nullify Ben Martin's conduct because Ben will say (and Ben is the only one that can say so) that he relied on his lawyers' advice. This serves merely to encourage the jury to sympathize (mistakenly) with Ben and ignore the law. In addition to unduly prolonging this trial, its introduction will be a complete waste of time,

because it is highly doubtful that the defendants will ever be able to meet the threshold requirements of an "advice of counsel" defense. In fact, this type of argument and evidence is so prejudicial that, even if an "advice of counsel" defense is not allowed at the conclusion of this trial and no charge ultimately is given to the jury, the defendants still win, in that they already will have created the false impression for the jury that the charged conduct (and the antitrust laws in general) involves an overly complicated area of the law and that the defendants were careful about following law, distracting the jury from the core issue of whether the defendants struck a collusive agreement and followed it.

Because of the resulting danger of unfair prejudice to the government and of jury confusion, such lawyer-witness testimony and argument should be excluded under Federal Rule of Evidence 403, which allows the Court to exclude even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

D. A PRETRIAL OFFER OF PROOF AS TO THE SUBJECT MATTER ABOUT WHICH A LAWYER-WITNESS WILL TESTIFY IS APPROPRIATE IN THIS CASE

The defendants have tipped their hands and forecasted for the Court and government their strategy of presenting irrelevant argument and evidence related to their claimed "advice of counsel" defense. Because the lawyers for PMG/Trinity News and Louis Page never represented Ben Martin or his company, however, these lawyer-witnesses have nothing to offer concerning any "advice of counsel" defense sought by, or given to, the defendants. Thus, the defendants must intend to call these lawyer-witnesses for another purpose. Presumably, that purpose is to introduce evidence that certain conduct (*e.g.*, the March 1993 settlement between Trinity News and Martin News) was reviewed by lawyers prior to being signed by the principal actors, Ben Martin and Brian Weiner.

This trial, however, is not about whether Ben Martin's or Brian Weiner's lawyers reviewed the settlement of this private litigation. Nor is this trial about the resolution of Ben Martin's lawsuit with Louis Page for conduct committed prior to Brian Weiner's purchase of Trinity News in Fort Worth. Rather, this trial is all about whether Ben Martin and Martin News

struck a collusive deal to divide up territories and customers. The fact that, during the charged conspiracy period, Ben Martin and his company also may have had other dealings with their co-conspirators that may arguably have been legitimate is not relevant to the charged conduct.

Consequently, before any lawyer testifies at this trial, there should be an offer of proof as to how their testimony is relevant. This will ensure that the proffered evidence is not more prejudicial than probative under Fed. R. Evid. 403.[3] It will also allow the government to raise discovery issues that remain with each of these lawyer-witnesses, an issue that is addressed fully in the *United States' Motion and Brief in Support of Discovery*.

[3] To be sure, the six lawyers who represented Weiner and his companies during the charged conspiracy seem to have viable privilege claims to assert. Are defendants planning to call these lawyers before the jury for the sole purpose of making them assert their privilege, making it look like one of the government's witnesses has something to hide? That would be improper and should not be allowed.

V
CONCLUSION

For the foregoing reasons, the United States requests an *in limine* Order barring the defendants from arguing or presenting any evidence that they relied on advice of counsel and, therefore, did not have the criminal intent necessary to violate the Sherman Act.

Respectfully Submitted,

"/s/"

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CERTIFICATE OF CONFERENCE

This is to certify that the undersigned attorney left a telephone message with Michael P. Gibson, counsel for Bennett T. Martin, and Richard A. Anderson, counsel for Martin News Agency, Inc., on January 15th , 2002, advising them of this Motion, and the undersigned lawyer represents to the Court that the defendants oppose this Motion.

SIGNED this 15th day of January, 2002

"/s/"
RICHARD T. HAMILTON, JR.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 15th day of January, 2002. In addition, copies of the above-captioned Motion were served upon the defendants via Federal Express on this 15th day of January, 2002.

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